

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

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DATE: August 2, 2021
TO: City of San Diego Redistricting Commission
FROM: City Attorney
SUBJECT: Census Delay Impact on Redistricting

INTRODUCTION

Redistricting is the process state and local governments nationwide use to redraw electoral district lines so that each district contains approximately the same number of people. Most governments complete redistricting every 10 years following the Federal Decennial Census. In the City of San Diego (City), the Redistricting Commission is authorized to redraw City Council (Council) district boundaries in the year following the census. San Diego Charter § 5.1. Federal law requires the United States Census Bureau (Census Bureau) to provide the data needed for state and local redistricting by April 1st in the year following the Federal Decennial Census. Pub. L. No. 94-171, 89 Stat. 1023 (1975). Due to challenges created by the COVID-19 pandemic, the federal census data has been significantly delayed.

To provide governments with as much lead time as possible, the Census Bureau intends to issue initial data by August 16, 2021, and final tabulated data by September 30, 2021. The State of California will merge initial data provided by the Census Bureau into a statewide database available for local jurisdictions to use for redistricting. San Diego Charter (Charter) section 5 gives the City nine months from the receipt of final census data to complete redistricting. To accommodate election needs, the San Diego County Registrar of Voters anticipates a December 15, 2021 deadline for the City to provide maps for the 2022 primary election.¹ Because of this December deadline, the Redistricting Commission wishes to begin soliciting community input prior to the receipt of final census data.

¹ Meeting the County Registrar of Voter's December 15, 2021 deadline ensures that candidates wishing to run for office will know the final Council district lines well before candidate nominating petitions are available. The San Diego Municipal Code (Municipal Code or SDMC) provides that nominating petitions for candidates become available 30 days prior to the California Election Code section 8020 deadline for submitting nomination papers to the Registrar of Voters. SDMC § 27.0204. The deadline for the City to submit candidate name to the Registrar of Voters under California Election Code section 8020 is 88 days before the primary election scheduled for June 7, 2022, which falls on March 26, 2022. The Redistricting Commission cannot base any redistricting decisions on where current or potential councilmembers reside. San Diego Charter § 5.1.

QUESTIONS PRESENTED

1. Can the Redistricting Commission begin holding public hearings to solicit community input on redistricting prior to the receipt of final census data?
2. Can the Redistricting Commission begin its work on adjusting Council district boundaries using preliminary census data from the statewide database prior to the release of final census data?

SHORT ANSWERS

1. Yes. There is no legal requirement that the Redistricting Commission wait for final census data to begin public hearings.
2. Yes. The Redistricting Commission may begin preparing draft plans using preliminary census data provided its redistricting decisions are confirmed with final census data.

BACKGROUND

The Charter requires the Redistricting Commission to hold nine public hearings prior to the preparation of a Preliminary Redistricting Plan. San Diego Charter § 5.1. The Preliminary Redistricting Plan is filed with the City Clerk, along with written findings and reasons for adoption. *Id.* Within 30 days following the filing of the Preliminary Redistricting Plan, the Redistricting Commission must hold at least five additional public hearings in various geographic areas of the City before adopting the Final Redistricting Plan. *Id.*

The Census Bureau releases initial census data prior to the release of final, tabulated census data. The release of initial census data is expected to occur before August 16, 2021. This initial census data uses the same information as final data but is not tabulated and does not include reallocation of incarcerated persons² and voting pattern data used by the United States Department of Justice to investigate violations of the Voting Rights Act, 52 U.S. Code § 10101-10702. The State of California will merge the initial census data into a user-friendly database that can be uploaded into mapping software to begin drafting boundaries. The Census Bureau will release final census data in a tabulated, user-friendly database prior to September 30, 2021.

ANALYSIS

I. THE REDISTRICTING COMMISSION MAY HOLD PUBLIC HEARINGS TO SOLICIT PUBLIC COMMENT PRIOR TO THE RECEIPT OF FINAL CENSUS INFORMATION.

The Charter does not require the Redistricting Commission to wait for final census data before conducting preliminary hearings. As explained in Charter section 5:

² In the State of California, cities can reallocate incarcerated persons to the location of their last known residence, rather than their place of incarceration, if such information is available. Cal. Elec. Code, § 21621(a)(2). This data is included in the final, tabulated census data and the Redistricting Commission can adjust the preliminary district boundaries after receipt to include reallocation in the Preliminary Redistricting Plan and Final Redistricting Plan.

The City shall be redistricted pursuant to Section 5.1 of this Charter at least once in every ten years, but no later than nine months following the City's receipt of the *final* Federal-Decennial Census information. The term "Federal-Decennial Census," as used in this Charter, shall mean the national decennial census taken under the direction of the United States Congress at the beginning of each decade. (Emphasis added.)

This passage is the only Charter reference to "final" data and uses that term to define the deadline for completing redistricting. City charters are documents of limitation, meaning that cities can take actions when they are not in conflict with the language in the charter. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994). The language here does not limit the City's ability to begin its redistricting work before final census data is received.

The Charter requirement for nine public hearings is for the purpose of soliciting public comment across the City. Voters approved Charter section 5.1 (Proposition C) to ensure incumbents were not responsible for drawing their own district lines and to provide "full public participation and scrutiny" into the redistricting process. Ballot Pamp. Primary Elec. (June 2, 1992), argument for Prop. C at 47. The only Charter requirement for timing is that the hearings occur "before the preparation of the Preliminary Redistricting Plan." San Diego Charter § 5.1. There is no requirement that public comment relate to census data. At prior public hearings, the City received testimony about language, shared festivals and gatherings, historical neighborhoods, and other community characteristics that commenters believed would be best served by a single Council district.

While there is no case law interpreting the references to census information used in the Charter, the Colorado Supreme Court issued a decision in June allowing the Colorado independent redistricting commission to base initial maps on preliminary data. The Colorado state legislature adopted a law defining "final census data" to include both initial and final tabulated census data to ensure that its redistricting commission could rely on preliminary data in drafting maps. S.B. 21-247, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021). The Colorado Supreme Court invalidated the law as an overreach of the state's legislative authority but noted that state law did not require the use of final data because that would defeat the law's intention of soliciting public input into the redistricting process. *In re Interrogatories on Senate Bill 21-247 Submitted By the Colorado General Assembly*, No. 21SA146, 2021 WL 2197398 at 10 (Colo. Sup. Ct. June 1, 2021). This allowed the Colorado redistricting commission to base initial maps on initial census data. *Id.*

The Colorado decision interprets different law, but the City's Redistricting Commission was established for similar reasons as Colorado's independent redistricting commission. Waiting for the receipt of final census data prior to soliciting public input would severely limit the time available for public input, thereby defeating one of the goals of the Redistricting Commission.

Although the Charter requires robust public input, that input would be ineffective if the public does not have sufficient information to provide meaningful comment on the redistricting process. In addition to initial census data, the City can provide 2019 San Diego Association of Governments (SANDAG) population data and the American Community Survey data published by the Census

Bureau annually to show the public where large population shifts have occurred. Based on the information currently available, the Redistricting Commission can provide sufficient information about population shifts to provide the public with an opportunity for meaningful discussion. The public will also have additional opportunities to weigh in throughout the redistricting process. The Charter requires five hearings following the creation of the preliminary map, which will be based on the final census data, allowing for public input on any changes caused by the addition of reallocated incarcerated persons.

Additionally, other redistricting commissions have begun holding public hearings prior to the receipt of final census data, including California Citizens Redistricting Commission. Considering the unprecedented delay in census data, the actions of other redistricting bodies to ensure public input into the redistricting process would support the City's Redistricting Commission moving forward with public hearings prior to the receipt of final census data.

II. THE REDISTRICTING COMMISSION MAY USE PRELIMINARY CENSUS DATA TO BEGIN DRAWING MAPS AS LONG AS FINAL CENSUS DATA SUPPORTS ITS CONCLUSIONS.

As discussed above, the only reference to "final" census data is in the Charter passage outlining the deadline for redistricting. Other references mandating the population of each Council district be based on census reports and composed of whole census units can be fulfilled with preliminary census data, which will include largely the same numbers as the final census data. The only data that could possibly change lines due to population shifts would be the reallocation of incarcerated persons.

The Redistricting Commission may begin the process of redrawing Council district lines so long as its redistricting decisions are supported by available data and confirmed with final census data. In *Bush v. Vera*, 517 U.S. 952 (1996), the U.S. Supreme Court held that three new districts in Texas were unconstitutional because the districts' lines were drawn using race as a predominant factor. The Court found arguments that one of the challenged districts' lines were drawn based on other criteria, such as consistent urban character, common media sources, or common transportation lines, were unpersuasive given that "the State's supporting data were not 'available to the Legislature in any organized fashion before [the challenged district] was created.'" *Id.* at 966 (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1338 (S.D. Tex. 1994)). The Court found it significant that at the time of redistricting, Texas had compiled detailed racial data for use, but had not attempted to compile or refer to any data regarding communities of interest. *Id.* at 967.

When adopting a redistricting plan, the Redistricting Commission's decisions should be supported by the final census data and evidenced in both the preliminary and Final Redistricting Plan. Nothing, however, prevents the Redistricting Commission from using the initial census data to begin drawing maps, as long as the Redistricting Commission can ensure that any variation in initial and final census data does not affect the Final Redistricting Plan.

CONCLUSION

The COVID-19 pandemic led to significant delays in the release of 2020 Federal census data necessary for the Redistricting Commission to complete the redrawing of Council district maps. Although the Redistricting Commission's Final Redistricting Plan must be confirmed with final census data, it may begin the process of redrawing district boundaries and soliciting public input with currently available data and preliminary census data expected in August 2021.

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MS-2021-16

Doc. No.: 2692971

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